

No. 12-2007 BN

Cindy LeBeouf’s practical nursing license is subject to discipline because her license was disciplined in another state, and she misrepresented facts in her application to the State Board of Nursing (“the Board”).

On November 13, 2012, the Board filed a complaint alleging cause to discipline LeBeouf's license. LeBeouf filed an answer on December 20, 2012. On April 30, 2013, we held a hearing on the complaint. David F. Barrett represented LeBeouf. Rodney P. Massman represented the Board. The matter became ready for our decision on July 12, 2013, when the last written argument was filed.

1. LeBeouf has lived in Louisiana most of her life, and she holds a practical nursing license in that state.

2. LeBeouf lived in Texas from October 2006 to September 2008. She obtained a “vocational nursing license” (similar to a practical nursing license in Missouri) from the Texas Board of Nursing (“the Texas Board”) during that time and worked in the field of home health care.

3. When LeBeouf left Texas, she returned to Louisiana.

4. On May 14, 2010, the Texas Board provided LeBeouf with a proposed Agreed Order that contained a sanction of warning with stipulations including the following findings of fact:

That, on or about February 27, 2008, while employed as a Field Nurse with Hallmark Lifeway Home Health, Austin, Texas, Respondent failed to provide care for Patient JM, whose diagnoses included Congestive Heart Failure (CHF) and Diabetes, as ordered by the physician, including accurate assessments and interventions, as follows:

- Respondent failed to weigh the patient;
- Respondent failed to accurately assess the patient’s left foot, which was discolored, as previously noted by the patient’s family members prior to the visit;
- Respondent failed to observe the patient take morning medications, and when she later learned that the patient had not taken the medications, failed to notify the physician; and
- Respondent failed to administer the PM dose of Insulin, or obtain an order when she decided to hold the Insulin. The physician had only ordered Insulin to be held if the blood sugar was under 80mg/dL; the PM blood sugar was 199 mg/dL. Respondent documented in the late entry narrative note, “Insulin held due to being sent to hospital.”

The patient was not transferred to the hospital until the latter part of Respondent’s afternoon visit, where it was revealed that she had sustained a fracture of her foot. Respondent’s conduct was likely to injure the patient from undetected progression of adverse clinical conditions and may have deprived the patient of timely medical interventions, which could have resulted in further complications; and

That, on or about February 27, 2008, while employed as a Home Health Nurse with Hallmark Lifeway Home Health, Austin, Texas, Respondent failed to timely and accurately document in the medical record of Patient JM and also falsely documented in the patient's medical record, as follows:

- Respondent failed to timely document that the patient had not taken morning medications on February 27, 2008, and instead documented that the patient had missed taking the medications in a late entry Narrative Note on March 2, 2008;
- Respondent documented in her PM Skilled Visit Note that the blood sugar reading of 119 mg/dL was fasting even though in her late entry narrative note she documented that it was a random blood sugar (i.e., not fasting);
- Respondent documented in her PM Skilled Visit Note that the patient had 3+ edema, but in the late entry narrative note documented that the edema was 2+;
- Respondent falsely documented in the PM late entry Narrative Note that Patient JM had eaten 100% of breakfast consisting of toast, ½ banana, and a glass of milk; however, there was no food in the house except jello cups; and
- Respondent falsely documented “no recent falls reported” in her PM Skilled Visit Note even though the patient had sustained multiple falls during the early morning hours preceding the visit on February 27, 2008.

Respondent's conduct was deceptive and resulted in an inaccurate, incomplete medical record.<sup>[1]</sup>

5. LeBeouf decided not to actively contest the Texas Board's action against her license. She had already moved back to Louisiana, and thought it was unlikely she would ever again want to practice nursing in Texas. On the advice of an attorney, she decided to simply surrender her Texas license.

6. On June 25, 2010, LeBeouf submitted a notarized statement to the Texas Board in which she voluntarily surrendered the right to practice vocational nursing in the state of Texas.

7. The Texas Board accepted the voluntary surrender of LeBeouf's vocational nursing license. In its final order (the “Texas Order”), it did not explicitly make findings of fact. It

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<sup>1</sup> Bd. Ex. A at 2-2 – 2-3.

recited the above findings of fact and stated that they were included in the proposed Agreed Order provided to LeBeouf, and then found that the evidence was sufficient to prove multiple violations of the Texas Occupations Code and administrative rules. The Texas Order also prohibited LeBeouf from practicing vocational nursing or petitioning for reinstatement for one year.

8. On March 29, 2012, LeBeouf applied for a practical nursing (“LPN”) license in Missouri.

9. In Section III, “Licensure History,” LeBeouf reported that she held an active LPN license in Louisiana against which no disciplinary action had been taken. She did not mention that she had been licensed in Texas.

10. LeBeouf answered “no” to question 15: “Have you ever been issued a professional license, certification, registration, or permit by any state, United States, territory, province or foreign country other than the licenses listed above?”

11. LeBeouf answered “no” to question 17: “Have you ever had any professional license, certification, registration, or permit revoked, suspended, placed on probation, or otherwise subject to any type of disciplinary action?”

12. LeBeouf answered “no” to question 19: “Have you ever voluntarily surrendered or resigned any professional license, certification, registration or permit?”

13. The Board issued LeBeouf an LPN license on April 26, 2012. LaBeouf lived in Missouri from May 2012 to August 2012, then returned to Louisiana.

### **Conclusions of Law**

We have jurisdiction to decide this complaint under §§ 335.066.2<sup>2</sup> and 621.045.1. The Board has the burden of proving by a preponderance of the evidence that LeBeouf has

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<sup>2</sup> Statutory references are to the RSMo Supp. 2012 unless otherwise indicated.

committed acts for which the law allows discipline. *See Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012). A preponderance of the evidence is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.” *Id.* at 230 (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)). We must judge the credibility of witnesses, and determine the weight and value to be accorded the evidence. *Kerwin*, 375 S.W.3d at 230.

In its complaint, the Board alleges LeBeouf is subject to discipline pursuant to § 335.066, which provides:

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

\* \* \*

(3) Use of fraud, deception, misrepresentation or bribery in securing any certificate of registration or authority, permit or license issued pursuant to sections 335.011 to 335.096 or in obtaining permission to take any examination given or required pursuant to sections 335.011 to 335.096;

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(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by sections 335.011 to 335.096;

\* \* \*

(8) Disciplinary action against the holder of a license or other right to practice any profession regulated by sections 335.011 to 335.096 granted by another state, territory, federal agency or country upon grounds for which revocation or suspension is authorized in this state;

(12) Violation of any professional trust or confidence[.]

Subdivision (3) – Fraud in Obtaining License

In order to find cause to discipline her license under § 335.066.2(3), we must find that LeBeouf committed “fraud, deception, misrepresentation or bribery” to obtain her license. LeBeouf argues that any of those causes for discipline requires a finding of intent, and that we cannot make this finding because she had no intent to deceive the Board. In support, she cites *Kerwin v. Mo. Dental Board*, another case in which a licensee’s alleged misrepresentation on an application was at issue:

Fraud and misrepresentation require intentional conduct.” *Seeger v. Downey*, 969 S.W.2d 298, 299 (Mo.App. E.D.1998). “Use of the terms fraud and misrepresentation indicates the legislature intended a scienter element be present for finding cause to discipline under certain subsections” of the statute. *Id.* at 299–300. “Fraud is defined generally under the common law as an intentional perversion of truth to induce another, or to act in reliance upon it.” *Hernandez v. State Bd. of Registration for the Healing Arts*, 936 S.W.2d 894, 899 n. 2 (Mo.App. W.D.1997). “Misrepresentation is generally defined as a falsehood or untruth made with the intent of deceit rather than inadvertent mistake.” *Id.* at 899 n. 3.

375 S.W.3d at 229-30. Thus, as the court explained in *Kerwin*, “to prove fraud or misrepresentation . . . the Board was required to prove by a preponderance of the evidence that Kerwin secured renewal of his license by intentionally misrepresenting” a material fact on his application. As the court further explained, however, this Commission is “the sole judge of witness credibility and of the weight and value to be given to the evidence.” *Id.* at 230. In *Kerwin*, the court of appeals affirmed our decision that Kerwin made an intentional misrepresentation on his license application, despite his protestation that he had no intent to deceive.

In this case, LeBeouf argues that she had forgotten about her Texas license when she filled out her Missouri application. LeBeouf surrendered the Texas license in June 2010 and applied for her Missouri license in March 2012, less than two years later. It begs credulity to accept that she simply forgot about such an event within less than two years. Even if she had put it out of her mind, the Missouri application form asked her no less than four times about other licenses she had held or disciplinary action she had undergone – including the specific question of whether she had ever surrendered a license. We find that LeBeouf committed fraud, deception, and misrepresentation when she filled out her application for a Missouri license. She is subject to discipline under § 335.066.2(3).

#### Subdivision (5) – Professional Standards

The Board’s complaint on this point is ambiguous. The complaint recites both LeBeouf’s alleged conduct when working for a home health care agency in Texas (the subject of the Texas Order) and her conduct in completing and submitting her application to the Board. It then states: “Respondent’s conduct, as described herein, constitutes dishonesty and misrepresentation in the performance of the functions and duties of a nurse, giving cause for discipline of her license pursuant to § 335.066.2(5)” – leaving it unclear whether the Board is referring to the conduct underlying LeBeouf’s surrender of her license in Texas, or her conduct in filling out her Missouri application. In its written argument, however, the Board argues only that LeBeouf’s Texas conduct is cause for discipline under this statute, and LeBeouf responds only to this argument. Therefore, we confine ourselves to consideration of whether that conduct is cause for discipline under § 335.066.2(5).

As evidence that LaBeouf is subject to discipline under this subsection, the Board relies only on the Texas Order. The Texas Order is contained in the Board’s Exhibit A, which was admitted at the hearing. At the hearing, LeBeouf objected to certain portions of that document as

hearsay and not the best evidence. She did not object to the Texas Order, however. Where no objection is made, hearsay evidence in the records can and must be considered in administrative hearings. *Clark v. FAG Bearings Corp.*, 134 S.W.3d 730, 736 (Mo. App., S.D. 2004) (citing *Dorman v. State Bd. of Regis'n for the Healing Arts*, 62 S.W.3d 446 (Mo. App., W.D. 2001)). Therefore, although the Texas Order also contains hearsay, we consider its contents, as well as LeBeouf's testimony.

However, LaBeouf is not estopped from denying or explaining the conduct described in the Texas Order, for two reasons. First, the findings of fact contained in the Texas Order are prefaced with the statement that they were findings of fact included in the *proposed* Agreed Order provided to LeBeouf, but they are not set forth as findings of fact in the final order, although the Texas Order also states that its evidence was sufficient to establish multiple violations of the Texas Occupations Code and administrative regulations. We consider this to be *some* evidence of the conduct described in the Texas Order, but because of the peculiar phrasing contained therein, not preclusive evidence. Second, even if the Texas Order were less ambiguously phrased, under the circumstances of its issuance, LeBeouf would not be collaterally estopped from denying the findings of fact contained therein.

Consent orders may, under some circumstances, be considered judgments on the merits and accorded collateral estoppel effect. *State ex rel. Malan v. Huesemann*, 942 S.W.2d 424, 429 (Mo. App. W.D., 1997). But, in order for collateral estoppel to apply, a four-part test must be satisfied: “(1) was the issue in the prior proceeding identical to the one in present litigation; (2) did the prior adjudication result in a judgment on the merits; (3) is the doctrine being asserted against a person who was a party to the previous litigation or in privity with such a party; and (4) did the party have a full and fair opportunity to litigate the issues previously decided.”



*State ex rel. Missouri Gas Energy v. Public Service Com'n of Missouri*, 224 S.W.3d 20, 26 (Mo.App. W.D., 2007), citing *Egan v. Craig*, 967 S.W.2d 120, 124 (Mo. App., E.D. 1998).

In *Malan*, the court determined that a licensee's consent order entered into with a professional licensing board was not a judgment on the merits: "That a party purported to find that its own allegations of facts, stipulated to solely for settlement, were true does not constitute a determination by an independent body that they indeed were valid." 942 S.W.2d at 430. We determine that we may consider LaBeouf's testimony regarding events underlying the Texas Order, and we consider her testimony on these points to be credible.

As noted above, misrepresentation is a falsehood or untruth made with the intent of deceit rather than inadvertent mistake. *Kerwin* at 230. Dishonesty is a lack of integrity or a disposition to defraud or deceive. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11<sup>th</sup> ed. 2004). Much of the Texas Order is concerned with LeBeouf's professional conduct in caring for patient J.M. A portion of it is concerned with LeBeouf's documentation, which the Texas Order variously characterizes as false, inaccurate, incomplete, and deceptive, and the Board's written argument discusses that portion of the Texas Order.

The Texas Order states that LeBeouf failed to timely or accurately document certain items in J.M.'s medical record. Even if those statements are true, such errors and omissions could be symptoms of negligence or incompetence rather than dishonesty or misrepresentation, both of which require a finding of intent. In her sworn testimony at the hearing, LaBeouf contradicted the two references to false documentation in the Texas Order -- that she falsely documented that she gave J.M. breakfast and falsely documented "no recent falls reported" in J.M.'s records.

We find no cause to discipline LaBeouf under § 335.066.2(5).

Other Disciplinary Action – Subdivision (8)

LeBeouf argues that she did not accept the Texas Order, but voluntarily surrendered her Texas license because she thought she was unlikely to practice in Texas again. She argues that her voluntary surrender under these circumstances is not a “disciplinary action.” We disagree.

The Texas Board acted under the authority of § 301.453 of the Texas Occupations Code, which allows the Texas Board, if it determines cause for discipline exists, to “enter an order imposing one or more” of various listed forms of discipline, including denial of an application, issuance of a written warning or reprimand, licensure restrictions, suspension, revocation, or assessment of a fine. § 301.453(a). Because acceptance of a voluntary surrender is not listed under this subsection, LaBeouf argues, it is not “discipline.” But § 301.453 also provides:

(c) The board may probate any penalty imposed on a nurse and may accept the voluntary surrender of a license. The board may not reinstate a surrendered license unless it determines that the person is competent to resume practice.

(d) If the board suspends, revokes, or accepts surrender of a license, the board may impose conditions for reinstatement that the person must satisfy before the board may issue an unrestricted license.

Furthermore, § 301.463(b) of the Texas Occupations Code provides that “[a]n agreed disposition of a complaint is considered to be a disciplinary order for purposes of reporting under this chapter[.]” The Texas code clearly contemplates that a voluntary license surrender falls within the ambit of disciplinary action.

Even if the Texas Board’s acceptance of LaBeouf’s surrender of her license were not a “disciplinary action” in that state, it qualifies as such in Missouri, and that is dispositive. In Missouri, “disciplinary action” has been defined as “any censure, reprimand, suspension, denial,

revocation, restriction or other limitation placed upon the license of a person[.]” *Bhuket v. State ex rel. Missouri Bd. of Regis’n for the Healing Arts*, 787 S.W.2d 882, 885 (Mo. App., W.D. 1990) (interpreting “disciplinary action” in 334.100.2(8), RSMo Supp. 1984). The Board showed that the Texas Board accepted the surrender of LeBeouf’s license and restricted her from practicing vocational nursing or from petitioning for reinstatement for one year. This action was a “restriction” on her license.

The Texas Board also restricted LeBeouf’s license on grounds for which revocation or suspension is authorized in this state. The findings of fact recited in its order would form the basis for discipline under § 335.066.2(5) for incompetence or misrepresentation, or under (12) for violation of professional trust. Whether or not these findings are sufficient to collaterally estop LeBeouf from denying the conduct set forth in the Texas Order, they are the grounds for the Texas Board’s disciplinary action. LeBeouf is subject to discipline under § 335.066.2(8).

#### Professional Trust – Subdivision (12)

Professional trust is the reliance on the special knowledge and skills that professional licensure evidences. *Trieseler v. Helmbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943). It may exist not only between the professional and her clients, but also between the professional and her employer and colleagues. *Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo. App., E.D. 1989). The Board argues that LeBeouf is subject to discipline because of her inaccurate documentation regarding patient J.M., as set forth in the Texas Order.

We agree. LeBeouf did not deny that her documentation regarding patient J.M. was inaccurate or incomplete. Accurate, complete documentation is critical for patient care, and patients and other health providers have a right to expect it and rely on it. We find that LeBeouf’s inaccurate, incomplete documentation was a violation of professional trust and confidence. She is subject to discipline under § 335.066.2(12).

### **Summary**

LeBeouf is subject to discipline under § 335.066.2(3), (8), and (12). She is not subject to discipline under § 335.066.2(5).

SO ORDERED on August 8, 2013.

*/s/ Karen A. Winn*

KAREN A. WINN

Commissioner